Congressional Research Service

Memorandum September 23, 2003

TO: House Committee on the Judiciary
Attention: Kanya Bennett

FROM: Janice E. Rubin
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SUBJECT: Antitrust Implications of the NFL's 3-Year Eligibility Rule

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You have requested a memorandum from us concerning the rule promulgated by the National Football League (NFL) in 1990 pursuant to which an athlete is ineligible to enter the NFL Draft until he has been out of high school for at least three years since his class graduated. Accordingly, before setting out the NFL Rule and its background, we will first present a brief overview of U.S. antitrust law, in order to create a context for assessing the likely antitrust implications of the rule. Finally, we will present a suggested alternative view for analyzing the eligibility rule under the labor law.

THE ANTITRUST LAWS

Section 1 of the Sherman Act (15 U.S.C. § 1) prohibits contracts or conspiracies in restraint of trade. Taken literally, the section would find any agreement among competitors to be a violation of the antitrust laws, and *per se* unlawful. Since at least 1911, however, the Supreme Court has considered that, except for a few activities that have almost always been found so egregious as to have no redeeming value (*e.g.,* price fixing, market or customer allocation),[1] most allegations of antitrust violation should be analyzed under the rule of

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[1] *E.g.*, United States v. Northern Pac. Ry. Co., 356 U.S. 1 (1958). See also, United States v. Trenton Potteries Co., 273 U.S. 392, 397-398 (1927) (price-fixing); United States v. Topco Associates, 405 U.S. 596, 609-611 (1972) (market allocation); National Society of Professional Engineers v. United States, 435 U.S. 679, 692 (1978) (ban on competitive bidding); Broadcast Music, Inc. v. CBS, 441 U.S. 1, 8-9 (1979) (blanket licensing of copyrighted musical compositions -- normally the kind of activity subject to *per se* treatment, but found acceptable because the practice enabled the industry to function); National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma, 468 U.S. 85 (1984) (prohibition on negotiation of individual contract for telecasting college football games).

reason.[2] The rule of reason is predicated on a balancing test, pursuant to which the anticompetitive harms of a given activity are weighed against any procompetitive results. In *Board of Trade of the City of Chicago v. United States*,[3] for example, the Court said

> ... the legality of an agreement cannot be determined by so simple a test as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. ... The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.[4]

Section 2 of the Sherman Act (15 U.S.C. § 2) prohibits monopolization or attempted monopolization. The basic antitrust truth, expressed in 1919 by the Supreme Court in *United States v. Colgate & Co.*,[5] despite certain exceptions and attempts to circumscribe it, remains that an entity -- even a monopolist -- is free to deal or not deal with any other entity unless its actions constitute either "guilty behavior"[6] or an attempt to expand its monopoly into a market adjacent to the one in which it may hold a lawful monopoly:

> In the absence of any purpose to create or maintain a monopoly, the [Sherman] act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal; and, of course, he may announce in advance the circumstances under which he will refuse to sell.[7]

Colgate and *Board of Trade* notwithstanding, instances in which a seller or buyer (the NFL would most likely be considered as a buyer of player services), who could *individually* make any determination it deemed advantageous or desirable concerning the terms on which it will deal, agrees with some other (often, commercial) entity that they will *jointly* take precisely the action(s) legally available to either one of them, constitute unlawful (and very likely, *per se* unlawful) boycotts or group refusals to deal.[8]

THE RULE

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[2] United States v. Standard Oil, 221 U.S. 1 (1911) is the case almost always associated with the advent of the rule of reason.

[3] 246 U.S. 231 (1918).

[4] 246 U.S. at 238.

[5] 250 U.S. 300.

[6] A monopoly achieved by means of, *e.g.,* predatory pricing, or some other type of anticompetitive (or "guilty") behavior, is viewed as distinctly different from a lawful monopoly -- one which has developed "as a consequence of a superior product, business acumen, or historical accident." *See, e.g.,* Berkey Photo, Inc. v. Eastman Kodak Co., 444 U.S. 1093,1094(1980), *quoting,* United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966); Crossroads Cogeneration Corp. v. Orange & Rockland Utils.,Inc., 159 F.3d 129, 141 (3d Cir. 1998).

[7] 250 U.S. at 307.

[8] That both the NFL and college football programs (including the exhibition of college football games) are commercial enterprises involving sizeable sums of money is not seriously disputed.

Prior to 1990, it was generally not possible for an athlete to enter the NFL Draft unless he had completed his 4 years of college eligibility (for which he was given 5 years) -- in effect, been out of high school for at least 4 years; in other words, although there was no rule specifically applicable to high school athletes, the effect of the "4 years of eligibility" requirement translated to "out of high school for at least 4 years." The rules concerning athlete eligibility for the NFL Draft were amended in 1990 so that, currently, a player is prohibited from entering the Draft until 3 years after his high school class graduates; generally, that translates to a player's junior year in college, at a time when he still has some college-level eligibility remaining.

ANTITRUST IMPLICATIONS OF THE RULE

The League's eased restrictions concerning its Draft eligibility rule came several years subsequent to the litigation involving a challenge by Spencer Haywood to the National Basketball Association's (NBA) eligibility rule; in that case,[9] the California district court found that the NBA's eligibility rule requiring a prospective player to have been out of high school for 4 years constituted an illegal group boycott that could not be justified on any of the bases put forth on its behalf -- the NBA's asserted "financial necessity" for the rule, which the court said could not justify an otherwise antitrust-violative practice;[10] the fact that the eligibility rule was instituted and maintained in order to assure that student athletes had the opportunity to complete their college educations (similar to the NFL's continued assertion that its current eligibility rule was instituted and is necessary because players immediately out of high school have neither the physical nor emotional maturity to withstand the rigors of

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[9] Denver Rockets v. All-Pro Management, Inc., 325 F.Supp. 1049 (D.C.Cal. 1971).

[10] Citing, among other cases, the 1959 Supreme Court decision in Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207, 212 (1959).

professional football);[11] and the fact that the colleges serve as a kind of unofficial (and inexpensive) "farm" system for professional basketball.[12]

In sum, the aspects of the NBA rule that were struck down in the Haywood case would seem to be not dissimilar to those of the NFL 3-years-out-of-high-school rule, despite the fact

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[11] "A second reason given by the NBA is that this type of regulation is necessary to guarantee that each prospective professional basketball player will be given the opportunity to complete four years of college prior to beginning his professional basketball career. However commendable this desire may be, this court is not in a position to say that this consideration should override the objective of fostering economic competition which is embodied in the antitrust laws. If such a determination is to be made, it must be made by Congress and not the courts." (325 F.Supp. at 1066). That language anticipated the Supreme Court's language in National Society of Professional Engineers v. United States, 435 U.S. 679, 689-690 (1978), in which the Court (1) rejected as justification for an ethical ban on competitive bidding the argument that such a ban was necessary in order to protect uninformed purchasers of engineering services from making unwise decisions, and (2) opined that even if the assertion were correct, only Congress could permit it to "trump"an antitrust violation. Another case which may be relevant in this regard is FTC v. Superior Court Trial Lawyers Ass'n., 493 U.S. 411 (1990), in which the FTC challenged a work-stoppage by court-appointed attorneys, allegedly instituted on behalf of the criminal defendants they served. Although the Court was sympathetic to the attorneys' dual arguments that (a) the level of service to indigent defendants was significantly and adversely affected by the limited resources available to the attorneys, and (b) that the concerted action to get increased compensation was but a means to secure higher quality service, it said: "[Although] ... the quality of representation may improve when rates are increased, ... that fact is [not] an acceptable justification for an otherwise unlawful restraint of trade. ... No matter how altruistic the motives of respondents ..., it is undisputed that their immediate objective was to increase the price that they would be paid for their services." (493 U.S. at 427).

[12] "[It] has [been] suggested that at least one of the reasons for the four-year college rule is that collegiate athletics provides a more efficient and less expensive way of training young professional basketball players than the so-called 'farm team' system, which is the primary alternative. Even if this were true, it would not, of course, provide a basis for antitrust exemption." (325 F.Supp. at 1066). In that respect, too, the current NFL Draft eligibility rule would appear similar to the NBA rule, in that it is beneficial to both the League and to the athletes' respective colleges: the colleges are able to retain the services of athletes who are likely to contribute to the colleges' football programs and the League can rely on a reliable supply of well trained players. (The one case that specifically addressed the relationship between the colleges and the NFL is seemingly at odds with both reality and most commentators: in Banks v. National Collegiate Athletic Ass'n, 977 F.2d 1081, 1089-1090 (7th Cir. 1992), the appeals court stated that "the NCAA does not exist as a minor league training ground for future NFL players but rather to provide an opportunity for competition among amateur students pursuing a collegiate education." *Compare*, *e.g.,*the Preface to Paul C. Weiler and Gary R. Roberts, SPORTS AND THE LAW (2d ed. 1998), which speaks of "the business as well as the popular appeal of the sports market"; Thomas R. Kobin, "The National Collegiate Athletic Association's No Agent and No Draft Rules: The Realities of Collegiate Sports are Forcing a Change," 4 Seton Hall J. Sport L. 483, 515 (1994), which calls "[t]he ... amateurism and educational/student welfare protection arguments ... tenuous at best"; Christopher L. Chin, "Illegal Procedures: The NCAA's Unlawful Restraint of the Student-Athlete," 26 Loy. L.S. L.Rev. 1213, 1214 (July 1993), which speaks of "increasing media coverage and increasing commercialization of college athletics." At the same time, the relationship between the NFL and the National Collegiate Athletic Association (NCAA) needs to be explored: although they are not competitors in the traditional sense, they do compete for the services of football players -- the colleges that comprise the NCAA and which compete among themselves in the potential-college-football-player market would compete with the NFL for the services of those players if the players were free to market themselves professionally at any time.

that the NFL has somewhat modified its restriction.[13] Accordingly, if the current (*i.e.,*1990) NFL rule were challenged on antitrust grounds, there is some precedent for a court to either strike it down, or significantly modify it.

On the other hand, many commentators express the opinion that the antitrust laws are less appropriate than are the labor laws for addressing restrictions that might best be included within collective bargaining agreements between the NFL Players' Association and the League, pursuant to the nonstatutory labor exemption from the antitrust laws for genuine, arm's-length, collective bargaining agreements.[14] In answer to the argument that such restrictions would likely not be eligible for inclusion in covered collective bargaining

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[13] At least one, scholarly source makes exactly that point, citing not only the Haywood case discussed on pages 3 and 4 of this memorandum, but also Linesman v. World Hockey Ass'n, 439 F. Supp. 1315 (D. Conn. 1977) (which struck down the age-20 player eligibility rule) and Boris v. United States Football League (USFL), 1984-1 Trade Cases (CCH) ¶66,012 (D. C.Cal. 1984) (which struck down the USFL rule "(like the pre-1990 NFL rule)" that required prospective League players to have first exhausted their college eligibility.) Paul C. Weiler and Gary R. Roberts, SPORTS AND THE LAW: TEXT, CASES, PROBLEMS (2d ed. 1998) at 175.

In Banks v. NCAA , 977 F.2d 1081 (7th Cir. 1992), however, the appeals court refused to find any anti-competitive effect on the player-recruitment market resulting from Banks' inability to resume eligible college football play after unsuccessfully entering the NFL Draft: the National Collegiate Athletic Association (NCAA) maintains a rule (By-law 12.2.4) pursuant to which college eligibility for football players is lost if a player enters the NFL Draft. The court quoted extensively from NCAA v. Board of Regents of the University of Oklahoma (468 U.S. 85, 102 (1984)) to emphasize its conclusion that the NCAA restriction is justified by the Court's apparent approval -- "the integrity of the 'product' [college football] cannot be preserved except by mutual agreement [between the NCAA, the colleges, and the NFL]; if an institution adopted such restriction unilaterally (restrictions on eligibility rules), its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable." What the appeals court did not note, however, was that the Supreme Court words did not preface its approval of the challenged NCAA restriction on negotiation of television broadcasting rights by individual colleges: the Court was merely explaining its determination that a *per se* analysis of the NCAA restriction was not justified, but that a rule of reason analysis should be used instead. As such, the quoted words were merely a prelude to a statement that not all NCAA restrictions will pass antitrust muster ("Our analysis of this case under the Rule of Reason, of course, does not change the ultimate focus of our inquiry. Both per se rules and the Rule of Reason are employed 'to form a judgment about the competitive significance of the restraint.' ... A conclusion that a restraint of trade is unreasonable may be 'based either (1) on the nature or character of the contracts, or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices. Under either branch of the test, the inquiry is confined to a consideration of impact on competitive conditions.'" 468 U.S. at 103. Indeed, the Court ultimately found the NCAA restraint on individual broadcast negotiation to be unreasonable: "The anticompetitive consequences of this arrangement are apparent. Individual competitors lose their ability to compete. ... Price is higher and output lower than they would otherwise be, and both are unresponsive to consumer preference. ... A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with th[e] fundamental goal of antitrust law." 468 at 106-107, cites and footnotes omitted.

[14] The judicially created labor-antitrust exemption holds that Congress' desire to foster collective bargaining agreements is best furthered by permitting employees who wish to jointly negotiate the terms of their employment contracts to do so without fear of violating the antitrust laws, and that the doctrine, if applicable, covers management as well as labor parties to a covered collective bargaining agreement.

agreements because they would affect non-parties to the agreement, the commentators note that, in fact, many conditions/requirements in such agreements (*e.g.,* requirements that management use "hiring halls," or those concerning the hours to be worked) actually affect non-parties to those agreements,[15] although we know of no case law to support that proposition. What evidence there is would seem to indicate that while a collective bargaining agreement may permissibly outline the conditions under which certain individuals may be hired, it probably cannot completely foreclose any opportunity of employment to those outside the collective bargaining agreement. For example, the 1993 NFL collective bargaining agreement contains a provision limiting the maximum amount that teams can pay to their entire group of first-year players, presumably to preserve the availability of salary funds for veteran players.

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[15] *See, e.g.,* Scott R. Rosner, "Must Kobe Come out and Play? An Analysis of the Legality of Preventing High School Athletes and College Underclassmen from Entering Professional Sports Drafts," 8 Seton Hall J. Sports L. 539, 564 (1998): "By their nature, all collective bargaining agreements affect those outside of the bargaining unit. Most salient to this discussion, the Supreme Court has recognized this to be the case with both seniority clauses ... and hiring halls ...despite both practices placing severe restraints on parties outside of the agreement." Footnotes omitted.